No. 83-489

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

LEON G. KAZANZAS, JR.,
Petitioner,

v.

WALT DISNEY WORLD CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

W. MARVIN HARDY, III, Esquire
(Counsel of Record)
Gurney & Handley, P.A.
203 N. Magnolia Avenue
P.O. Box 1273
Orlando, FL 32802-1273
(305) 843-9500

Counsel for Petitioner

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTION PRESENTED

Did the Court of Appeals err in determining that the failure of Respondent, Walt Disney World Co., to post the required ADEA notice did not toll the two year time limit in which Petitioner was required to bring his civil action for violations of the Age Discrimination in Employment Act (A.D.E.A.)?

PARTIES IN PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Since the issuance of the judgment of the Court of Appeals there has not been any change in the parties participating in this case. Consequently, the caption of this Petition contains the names of all parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

LEON G. KAZANZAS, JR.,
Petitioner,

v.

WALT DISNEY WORLD CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, LEON G. KAZANZAS, JR., (hereinafter KAZANZAS), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 19, 1983, which reversed the decision of the United States District for the Middle District of Florida, Orlando Division, which had found that the failure of WALT DISNEY WORLD, CO., to post on its premises a notice poster required by the ADEA tolled the running of the two year statute of limitations until Petitioner contacted an attorney in June, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 704 F.2d 1527. The decision of the United States District Court rendered on July 14, 1981, and reversed by the Court of Appeals, is reported at 518 F.Supp. 292. Both opinions appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on May 19, 1983. A timely petition for rehearing pursuant to Rule 40, Federal Rules of Appellate Procedure was denied on June 24, 1983, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§255. Statute of Limitations

(a) [I]f the cause of action accrues on or after May 14, 1947 – may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

§623. Prohibition of age discrimination

(a) It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

§626. Recordkeeping, investigation and enforcement

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission (EEOC).[1] Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred; or

(2) [OMITTED – Not relevant to this case.]

(e)(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

§627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary[2] [of Labor] setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.[3]

---

[1]The statute in effect at the time Petitioner was discharged required a notice of intent to sue be filed with the Secretary of Labor within the same time limits. The effect of the present language is the same as the former one only the words have been changed.

[2]All functions vested in Secretary of Labor pursuant to this section were transferred to the Equal Employment Opportunity Commission by section 2 of 1978 Reorg. Plan No. 1, 43 F.R. 19807, 90 Stat. 3781.

[3]Copies of the notice poster promulgated by the Secretary in 1976 and 1978 appear in the Appendix to this petition. Please note that the copies are reductions of the actual posters.

STATEMENT OF THE CASE

On July 27, 1979, Petitioner KAZANZAS filed a Complaint against Respondent WALT DISNEY WORLD CO. pursuant to the provisions of 29 U.S.C. §623, et seq., popularly known as the Age Discrimination in Employment Act (ADEA). (R. 1-4). The Complaint alleged that Petitioner was a fifty-four-year-old painter employed by Respondent from April 30, 1971, to February 26, 1977, at which time Petitioner was willfully and intentionally discharged on the basis of Petitioner's age in violation of 29 U.S.C. § 623. (R. 1-2). In response to the Complaint, Respondent raised the affirmative defense of the statute of limitations and alleged Petitioner's action was barred by failure to file notice of intent to sue within 180 days after the alleged unlawful practice as required by 29 U.S.C. §626(b). (R. 6-7). In pre-trial documents, the parties stipulated that the United States District Court for the Middle District of Florida had jurisdiction of this cause pursuant to 28 U.S.C. § 1331, 29 U.S.C. §§ 216, 217 and 29 U.S.C. §626 (c).

At the close of Petitioner's case, Respondent moved for a directed verdict on the basis of the statute of limitations and Petitioner's failure to file a notice of intent to sue within the required 180 days. (T. 461-466). The trial court reserved ruling on whether there was sufficient evidence to allow equitable tolling of the 180 day period and reserved ruling on whether the statute of limitations barred the claim. (T. 469-470). Following the close of all the evidence, the Respondent renewed its Motion for Directed Verdict and the Court once again reserved ruling and indicated that he would allow the parties to argue the question post verdict. (T. 490, 493).

The case was submitted to the jury on a special verdict

form. (R. 247-248). Item 1 of the verdict form requested the jury to determine whether age was a motivating factor in the discharge of Petitioner by Respondent on February 26, 1977. (R. 247). This question was answered in the affirmative by the jury. (R. 247). However, the jury further found that Respondent had not willfully discriminated. (R. 247).

A number of post-trial hearings were held on Respondent's 180 day and statute of limitation defense. One of these hearings was an evidentiary hearing in which the Petitioner presented the testimony of Sam Swirsky (R. Vol. 6 p. 4). Mr. Swirsky testified that he was employed with the U.S. Department of Labor, Wage and Hour Division, from 1960 to 1979, at which time he was transferred to the E.E.O.C. pursuant to a reorganization plan. (R. Vol. 6, p. 5). During his tenure with the Department of Labor, Mr. Swirsky was charged with the responsibility of A.D.E.A. enforcement. (R. Vol. 6, p. 6). He identified as Petitioner's Exhibit 1, a poster promulgated by the Department of Labor that was in effect at the time of Petitioner's discharge. (R. Vol. 6, pp. 6-9). This poster advises that a person subject to age discrimination may bring a court action and is required to notify the Secretary of Labor of his intent to sue not later than 180 days after the alleged unlawful practice occurred. Mr. Swirsky also examined a poster published by Respondent stating its corporate policy and that it is an equal opportunity employer. (Respondent's Exhibit 4). Mr. Swirsky testified with respect to A.D.E.A. notice that Disney's poster had never been approved or prepared by the Department of Labor. (R. Vol. 6, pp. 10-11).

In its Memorandum of Decision dated July 14, 1981, the trial court determined that Petitioner's action was not barred by the statute of limitations or Petitioner's failure

to file a notice of claim within the 180 day period required by 29 U.S.C. §626(d)(1). (R. 297-303). The Court held that the Petitioner was entitled to an equitable tolling of the 180 day provision as well as the applicable statute of limitations. (R. 297-303). The trial court determined that Respondent had failed to comply with the provisions of 29 U.S.C. §627 which requires employers to post a poster promulgated by the Department of Labor advising employees of their A.D.E.A. rights. (R. 299). The company poster utilized by Respondent was not in a form approved by the Secretary of Labor. (R. 200, Defendant's Exhibit 4. The Court held that because of Petitioner's lack of actual knowledge of his A.D.E.A. rights and the ready means of obtaining the same until June, 1979, when he consulted a lawyer, the absence of prejudice from Petitioner's delay and Respondent's failure to post a notice in conformity with the requirement of §29 U.S.C. §627, an equitable tolling of the 180 day period, as well as the statute of limitations, was warranted. (R. 299-303).

On December 11, 1981, both Petitioner and Respondent filed notices of appeal to the Court of Appeals for the Eleventh Circuit from the final judgment. Petitioner's appeal to that Court on the issue of damages is not an issue in this petition. The Court of Appeals had jurisdiction of said appeal pursuant to 28 U.S.C. §1291. On May 19, 1983, the Court of Appeals reversed the judgment of the District Court. Petitioner's Petition for Rehearing was denied on June 24, 1983.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *ZIPES V. TRANS WORLD AIRLINES, INC.*, ___ U.S. ___ 102 S. CT. 1127 (1982).

In *Zipes v. Trans World Airlines, Inc.*, ___ U.S. ___, 102 S. Ct. 1127 (1982), this Court was confronted with the question of whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the requirement is subject to waiver and estoppel. 102 S. Ct. at 1132. The act in question required a charge to be filed with E.E.O.C. within 90 days of the discrimination. *Id.* at 1130 n. 2. Before answering the question presented, this Court recited the pertinent facts. *Id.* at 1129-1132. A brief summary of them is pertinent here. In 1970, several individuals brought a class action suit against the defendant airline, alleging they had been discriminated against in employment by the defendant in violation of Title VII. The class contained individuals who had been discharged by defendant between July, 1965, and October, 1970. Also, in 1970 the Air Line Stewards and Stewardesses Association (ALSSA) filed a class action against the defendant based upon the practices challenged by plaintiffs in the first suit. Settlement was reached in the union's suit and was approved by the district court. The Court of Appeals for the Seventh Circuit overturned the settlement, finding the union to be an improper party to be a representative plaintiff and remanded with instructions that individuals be named as representative plaintiffs. After remand, defendant moved to exclude from the suit those class members who had failed to file a timely charge with the E.E.O.C. The District Court denied the motion, finding the filing requirement to be a jurisdictional requirement not subject to waiver or estop-

pel but found defendant's actions to be a continuing violation against all class members with the result that the time period had never begun to run. The District Court found it had jurisdiction over all of the class members and granted summary judgment for plaintiffs on the issue of liability. The Court of Appeals affirmed the summary judgment but rejected the continuing violation theory and concluded that the claims of those members of the class who had not timely filed an EEOC charge were barred by said failure. The United States Supreme Court granted certiorari. In discussing the merits of the case, this Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but rather is a requirement that, like a statute of limitations, is subject to waiver, estopped and equitable tolling." 102 S.Ct. at 1132. As a result, the United States Supreme Court concluded that the District Court did in fact have jurisdiction over those members of the class who had been discharged prior to 1970 and who had failed to comply with Title VII's filing requirement. *Id.* at 1135.

Implicit in this Court's decision in *Zipes* is the holding that other statutes of limitations which would bar claims for relief under Title VII are tolled for the same period of time for which the 180 days of filing period is suspended. Such a reading is necessitated by the fact that this Court found that the trial court had jurisdiction over those members of the class discharged between 1965 and 1970. Had this Court not also tolled the applicable statute of limitations, the claims of these individuals would have been time barred by said limitation and the District Court would not have had jurisdiction over these claimants. Thus, it must follow that statutes of limitations can be tolled for the same period as any charge filing period. The Court of Appeals in the instant case ignored this implied holding and rendered a decision directly contrary to it.

The fact that *Zipes* concerned a Title VII action does not mandate a different result in the instant ADEA case. This Court has said that because Title VII shares with ADEA a common purpose, i.e., elimination of discrimination in the workplace, because the statutory schemes are similar and because both statutes require almost identical filings with the appropriate agency within 180 days after the alleged discriminatory act, cases arising under one statute will be considered to have value as precedent for cases arising under the other. *See, Oscar Mayer and Co. v. Evans,* 441 U.S. 750 (1979) *cited in, Coke v. General Adjustment Bureau,* 640 F.2d 584 (5th Cir. 1981).

At least one district court has followed the implied holding in *Zipes.* In *Baruah v. Young,* 536 F. Supp. 356 (D. Maryland 1982) the Court found that plaintiff's suit was not time barred where plaintiff was discharged on October 25, 1978, filed his charge with the EEOC on November 21, 1979 and waited to file suit until May 28, 1981. 536 F. Supp. at 359-340. The Court found that the Plaintiff had alleged facts, which if proven, would entitle him to a tolling of the 180 day period until June of 1979. *Id.* at 361. Implicit in that Court's ruling was a determination that the two year statute of limitations was also tolled until that date. Had this not been the situation, the district court surely would have dismissed Plaintiff's complaint as it was clearly initiated beyond the two year period.

The rule of *Zipes* and *Baruah* should have been applied by the Court of Appeals in the instant case. The Eleventh Circuit decision in the instant case totally ignores the cases cited above and the Eleventh Circuit's decision should not go unchecked by this Court.

2. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE TOLLING OF THE STATUTE OF LIMITATION CONTAINED IN 29 USC, SECTION 215, AND THE CIRCUMSTANCES WHICH WARRANT SUCH A TOLLING.

Numerous decisions have been rendered by multiple United States Courts of Appeals concerning under what circumstances it is proper to toll the running of the 180 day filing period. Many of these cases have revolved around the failure of the employer in question to post the notice required by 29 U.S.C., Section 627. Except in the most unusual of circumstances, these decisions have uniformly held that an employer's failure to post such a notice tolls the running of the filing period until such time as the injured employee seeks out an attorney or acquires actual knowledge of his rights under the ADEA. *See, e.g., Charlier v. S.C. Johnson & Son, Inc.*, 556 F.2d 761 (5th Cir. 1977); *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1978); and *Kephart v. Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978). In each of the above cases the time period was tolled. Examples of situations that did not warrant tolling because of the employer's failure to post notice, are contained in *Adams v. Federal Signal Corp.*, 559 F.2d 433 (5th Cir. 1977), and in *Templeton v. Western Union Telegraph Company*, 607 F.2d 89 (5th Cir. 1979). In both of these cases the employees were found to have independent knowledge of the ADEA prior to or closely after their discharge. In the instant case the District Court found that Petitioner did not have actual knowledge of his ADEA rights until he consulted an attorney in June of 1979, and concluded that the two year statute of limitations, as well as the 180 day period, were tolled until then. 518 F. Supp. at 294.

The decision of the District Court in the instant case,

was in accord with the decisions cited above, as well as the decisions of *Ott v. Midland-Ross Corporation,* 523 F.2d 1367 (6th Cir. 1975) *appeal after remand* 600 F.2d 24 (6th Cir. 1979); and *Thomas v. E. I. DuPont de Nemours & Co.,* 574 F.2d 1324 (5th Cir. 1978) in which the statutes of limitations were tolled as a result of employers misleading their discharged employees into believing they would be rehired.

In rendering its decision to toll the two year period, the District Court, in the instant case, relied upon *Downey v. Southern Natural Gas Company,* 649 F.2d 302 (5th Cir. 1981). In *Downey,* the Court of Appeals cited *Powell v. Southwestern Bell Telephone Company,* 494 F.2d 485 at 487 (5th Cir. 1974) and said:

> "The Court in (in *Powell*) explained that the required 180-day notice was a 'prerequisite' to filing suit, and that after the notice was given Plaintiff would have two or three years to file suit depending on the type of violation."

The Eleventh Circuit Court of Appeals attempted to distinguish *Downey* and *Powell* from the instant case. This attempt to distinguish these cases is at best characterized as weak and should be ignored by this Court. The Court of Appeals also cited *Marshall v. Kimberly-Clark Corporation,* 625 F.2d 1300 (5th Cir. 1980) for the proposition that both time periods run from the date of discharge. *Marshall* does not stand for this proposition, but rather *Marshall* declared that both time limits start from the same date. 625 F.2d at 1301. While ordinarily that date will be the date of discharge, the Court did not state this to be a hard and fast rule. In the instant case, the District Court found that certain equities warranted the tolling of the 180-day period and the two-year limitation until June of 1979. Thus, the District Court's ruling is consistent with

Marshall while the Eleventh Circuit Court of Appeals decision conflicts with *Marshall*.

The Court of Appeals decision also conflicts with the numerous decisions which declare that the ADEA is remedial and humanitarian legislation which should be liberally construed to effectuate the congressional purpose of ending age discrimination in employment. See, e.g., *Bonham v. Dresser Industries, Inc.*, supra; *Gabriele v. Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978); and *Dartt vs. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976) *aff. by divided Court* 434 U.S. 99 (1977).

In summary, the District Court's decision that the two year statute of limitation was tolled for the same period of time as the 180 day filing requirement is consistent and in accord with prior decisions on this issue. The Court of Appeals in reversing, ignored these decisions and rendered an opinion contrary to them. This Court should grant this Petition and rectify this conflict of authorities so that future litigants will be aware of their rights and obligations under the ADEA.

3. THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVIEWED BY THE SUPREME COURT IN THE EXERCISE OF ITS POWER OF SUPERVISION OVER THE CIRCUIT COURT OF APPEALS BECAUSE THE DECISION IS ERRONEOUS IN THREE ASPECTS:

A. THE DECISION IGNORES THE REMEDIAL AND HUMANITARIAN POLICIES ADVANCED BY THE A.D.E.A.

B. THE DECISION IS SO INCONSISTENT AND CONFUSING THAT FUTURE LITIGANTS WILL NOT BE ABLE TO ASCERTAIN WHAT EFFECT IT IS TO HAVE.

C. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS OWN DETERMINATION OF THE FACTS FOR THE FACTS DETERMINED BY THE DISTRICT COURT.

In its May 19, 1983, decision, the Court of Appeals held that an equitable tolling of the 180 day period specified in the Age Discrimination and Employment Act for filing a Notice of Intent to Sue with the Secretary of Labor will not necessarily result in an equitable tolling of the applicable two year statute of limitations. In so holding, that Court has overlooked those cases which have held that those principles which govern the equitable tolling of a statute of limitations will also be applicable to the equitable tolling of the 180 day time limitations. See *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981).

In *Coke* the Fifth Circuit reviewed the numerous Circuit Court decisions recognizing the doctrine of equitable tolling in age discrimination litigation. The issue as framed in *Coke,* is whether the equitable tolling principles applicable to statutes of limitations should also be likewise applicable to effectuate equitable tolling of the 180 day filing limita-

tion. The *Coke* decision also made extensive reference to the legislative history indicating that Congress intended the 180 day filing period to be a "statute of limitations" rather than a jurisdictional prerequisite. 640 F.2d at 593. Thus, the *Coke* decision, and authorities of similar import, clearly hold that the equitable tolling doctrine applicable to ordinary statutes of limitations should also be made applicable to the 180 day filing period. Consequently, the same facts and circumstances which would warrant equitable tolling of the 180 day time limitations would also warrant equitable tolling of the statute of limitations. If the complaining party in age discrimination litigation is entitled to equitable tolling of the 180 day time limitation period, he is also entitled to equitable tolling of the ordinary statute of limitations since the same concepts of equitable tolling apply to both limitation periods.

The Eleventh Circuit Court of Appeals overlooked those cases which have held that the A.D.E.A. legislation is to be liberally construed to effectuate its remedial and humanitarian goal of eliminating age discrimination in employment. *Bonham* and *Dartt,* supra.

The following language contained in the Title VII case of *Sanchez vs. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), at pages 460-461, should be noted:

> "The basic purposes of the Act, however, are clearly discernible. Mindful of the remedial and humanitarian underpinnings of Title VII and of the crucial role played by the private litigant in the statutory scheme, courts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act. Consequently, courts confronted with procedural ambiguities in the statutory framework have, with virtual unanimity, resolved them in favor of the complaining party."

Also, in the same case of *Sanchez vs. Standard Brands, Inc.*, supra, the Court stated the claimant should be able to get to the merits of the case and stated the following at page 467:

> In his typically colorful manner, Chief Judge Brown of this circuit has characterized an encounter between a Title VII complainant and a huge industrial employer" as a "modern David and Goliath confrontation."
>
> * * *
>
> ". . . in such a confrontation, surely Goliath should not be allowed to fell David with the help of a club fashioned from forms and legal technicalities. The most elementary principles of justice require us to remove the club and compel a battle on the *merits* of the controversy." (Emphasis in original) (Citations Omitted)

In the instant case, Respondent is a huge employer, a Goliath of a corporation which utilizes the services of many thousands of workers. As indicated in the testimony before the trial court, Respondent DISNEY is also a knowledgeable and sophisticated employer which has a full-time employee to insure compliance with applicable employment laws and regulations. (T. Vol. III; 200). The "little David" of the case, a laborer by the name of KAZANZAS, should be allowed to present the merits of his claim. To do otherwise is to defeat the policies and goals enacted by Congress through the A.D.E.A. This Court should not allow the result of the Eleventh Circuit decision to remain standing.

The Court of Appeals in its decision assumes that there are no facts and circumstances which would justify an equitable tolling of the statute of limitations and that the evidence in the case supports only equitable tolling of the 180 day filing period. However, that Court overlooks the

fact that in the instant case, the trial court expressly held that the Petitioner was entitled to an equitable tolling of the 180 day limitation period for in excess of two years, until June, 1979. Since Petitioner was wrongfully discharged on February 26, 1977, the statute of limitations, without tolling, would have expired in February, 1979. The Court of Appeals' decision leads to the incongruous result of an A.D.E.A. litigant being entitled to equitable tolling of the 180 day period until June, 1979, but having the statute of limitations cut off as the cause of action in February 1979, when the law had hitherto been well established that the same principles which govern the equitable tolling of the statute of limitations govern equitable tolling of the 180 day time limitation. It should be noted that the Court of Appeals in its decision, made no finding that Petitioner was not entitled to an equitable tolling of the 180 day limitation until June, 1979.

The same equitable principles, and the same facts which mandate a tolling of the 180 day filing requirement, should also dictate an equitable tolling of the two year statute of limitations. Reason and common sense dictate that if the 180 day period is a statute of limitations and hence subject to equitable tolling; that the two year ADEA statute of limitations is, of necessity, also subject to equitable tolling. Yet the Court of Appeals rejects this rationale and concludes that while the 180 day requirement was tolled, the two year limitation was not. Why this is so, is left unexplained by the Court of Appeals. Such a result cannot be sanctioned. This Court should grant this Petition and correct this confusing decision so that future litigants will be aware of whether the ADEA's two year limitation is capable of being tolled and, if so, what circumstances justify such a tolling.

The decision appealed from is inconsistent in a second respect. As stated earlier in this Petition, the Court of Appeals relied upon *Marshall v. Kimberly-Clark Corporation,* supra for the proposition, that both time limits run from the date of discharge. This is incorrect. *Marshall* holds that both limits start from the same date. In the instant case, this is exactly what the District Court did. It found that the facts of their case warranted the tolling of both limitation periods until June of 1979. Thus, the trial Court's ruling was in accord with the cases relied upon by the Court of Appeals in reversing the trial court. As a result, the decision appealed from is contradictory on its face. This Court should grant this Petition so that such an untenable conclusion may be corrected.

C. It is a well established rule of appellate practice that the findings of fact of a trial court will not be disturbed on appeal unless such findings are clearly erroneous. This Court has said that under the clearly erroneous rule "an appellate Court cannot upset a trial court's factual findings unless it is left with the definite and firm conviction that a mistake has been committed." *Guzman v. Pichirilo*, 369 U.S. 698 (1962). In the instant case, the trial judge, expressly found that as a result of Respondent's failure to post the notice required by 29 U.S.C. Section 627, the Petitioner was deprived of a reasonable opportunity to consult with the Department of Labor or the EEOC and that as a further consequence thereof, Petitioner was without knowledge of his rights under the ADEA. The trial judge also found that this failure to post notice warranted the tolling of the 180-day and two year time limitations until June 1979. Despite these findings of fact the Court of Appeals reexamined and reevaluated the evidence in concluding that a tolling of the two year statute of limitations was not warranted. It is not the place of a higher court to disturb the evidentiary findings of the lower court unless the evidence

plainly fails to support the findings of the trier of fact. *Roemer v. Maryland Public Works Board,* 426 U.S. 736 (1976). The District Court's findings of fact and the results attached to them were not clearly erroneous. Therefore, the Court of Appeals acted improperly and exceeded established boundaries in reversing the District Court's decision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

W. MARVIN HARDY, III, Esquire
(Counsel of Record)
GURNEY & HANDLEY, P.A.
P.O. Box 1273
Orlando, FL 32802
(305) 843-9500
Counsel for Petitioner

Dated: September 22, 1983.

APPENDIX A

Leon G. KAZANZAS, Jr., Plaintiff

v.

WALT DISNEY WORLD CO.,
etc., Defendant.

No. 79-379-Orl-Civ-R.

United States District Court,
M. D. Florida,
Orlando Division.

July 14, 1981.

W. Marvin Hardy, III, Gurney, Gurney & Handley, Orlando, Fla., for plaintiff.

John L. O'Donnell, Jr., of DeWolf, Ward & Morris, Orlando, Fla., for defendant.

MEMORANDUM OF DECISION

JOHN A. REED, Jr., District Judge.

Following a jury verdict which found that the plaintiff was discharged by the defendant in violation of the plaintiff's rights under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., the defendant on 5 May 1981 filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The plaintiff on 4 May 1981 filed a motion to enter judgment on the jury

verdict. The plaintiff later amended the motion by a supplement filed on 20 May 1981 which in effect asks the court to disregard the jury's finding that the plaintiff's discharge was not wilful and to enter a judgment against the defendant for liquidated damages.

The defendant's motion raises three issues: (1) whether or not the plaintiff's claim is barred by the application of Section 626(d)(1), Title 29, U.S. Code; (2) whether or not the plaintiff's claim is barred by the statute of limitations, and (3) whether or not there is sufficient evidence to support the verdict.

With regard to the first issue, the defendant contends that the plaintiff's claim is barred because the plaintiff failed to file a charge with the Secretary of Labor within 180 days of his discharge* as required by Section 626, Title 29, U.S. Code. The plaintiff contends that he is entitled to an equitable modification of the 180 day provision because of the defendant's failure to post a notice in conformity with Section 627, Title 29, U.S. Code. Pertinent to these contentions are the following facts. The plaintiff was discharged by the defendant on 26 February 1977. At the time of his discharge, the plaintiff knew that he could not be discriminated against because of his age. The plaintiff testified that he imagined the source of this knowledge was a poster in evidence as defendant's Exhibit 4 which had been placed on defendant's premises. As a management level employee, the plaintiff had read the collective bargaining contract which covered workers in the

*Florida's age discrimination act became effective 1 July 1978. It was not in effect at any time during the 180 day filing period established by 29 U.S.C. § 626(d)(1). For that reason 29 U.S.C. § 633(b) had no effect on the notice filing period. See § 23.167, Fla.Stat. Anno.

plaintiff's employment unit. Article 13 of the agreement in effect on 1 October 1976 provides:

> "The Company and the Union agree there shall be no discrimination against any employee or prospective employee due to race, color, creed, sex, age or national origin as provided in Federal and State legislation."

On the day of plaintiff's discharge, Gary Lawton, a personnel manager of defendant, told the plaintiff that Lonnie Linley, had made the decision to lay off the plaintiff and to retain Bill Cunningham, another of defendant's employees. At the same time, Lawton told the plaintiff that Bill Cunningham was seven years younger than the plaintiff, but that the plaintiff would be the first person to be recalled when an opening developed. Thus, when the plaintiff was discharged he was generally aware of a right not to be discriminated against on the basis of age and of facts which would reasonably lead the plaintiff to conclude that his discharge was based on age. Despite this knowledge, the plaintiff did not consult with an attorney until June, 1979. It was at the time he first acquired knowledge of the 180 day filing requirement. On 5 July 1979, the plaintiff's attorney mailed a notice of the plaintiff's charge to the Equal Employment Opportunity Commission office in Miami, Florida (see plaintiff's Exhibit B), and instituted the present action on 27 July 1979.

The evidence at trial revealed that the only notice relevant to age discrimination defendant posted at the plaintiff's former place of employment is the poster in evidence as plaintiff's Exhibit 4. The poster does not comply with the provisions of Section 627 of Title 29, U.S. Code. It was not in the form approved by the Secretary of Labor. At a post-trial hearing before the court on 2 July 1981, a

copy of the notice which had been approved by the Secretary of Labor for use in 1977 was introduced in evidence as plaintiff's Exhibit 1. That notice clearly advises of the need for compliance with the 180 day filing provision. The notice actually posted by the defendant imparts no such information and at best reveals a company policy against age and other impermissible discrimination. No evidence was presented which would suggest that the defendant was disadvantaged by the plaintiff's delay in filing his charge of discrimination. On the contrary, the evidence shows that the plaintiff remained in close contact with his former employer until August 1977, when it was determined that the plaintiff's physical condition precluded his reemployment in his former position.

This case is unlike *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981) in that here there was no misrepresentation by the defendant of its intent to rehire or otherwise accommodate the plaintiff's claim. The plaintiff in the present case is extremely close in situation to the plaintiff in *Templeton v. Western U. Telegraph Co.*, 607 F.2d 89 (5th Cir. 1979). There is, however, this significant difference: Mr. Templeton had the benefit of the 1968 poster promulgated by the Department of Labor and presumably gleaned from it knowledge that the Secretary of Labor was a potential source of assistance in understanding and enforcing his right to he immune from age discrimination. Mr. Kazanzas, on the other hand, did not have that degree of actual knowledge until he consulted an attorney in June, 1979.

The present case is a classic example of one problem created for trial judges and litigants once the process of judicial modification of statutory limitations on statutory rights is set in motion — certainty in the law is all but lost.

Nevertheless, this court concludes that because of the plaintiff's lack of actual knowledge and a ready means of obtaining same until June 1979, the absence of prejudice from plaintiff's delay, and the defendant's failure to post a notice conforming to the requirements of 29 U.S.C. § 627, the filing period should be tolled until the plaintiff first consulted an attorney in June, 1979. *Quina v. Owens-Corning Fiberglas Corp.*, 575 F.2d 1115 (5th Cir. 1978), suggests in dictum that such is a proper result of the present case. See also *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3rd Cir. 1977), which held that the failure to post the statutory notice tolls the running of the 180 day period until the aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the ADEA.

Presumably actual knowledge of one's rights under the ADEA includes knowledge of the limitation imposed thereon by Section 626(d). In support of its holding the court in Bonner suggested that:

> "Any other result would place a duty upon the employer to comply without penalty for breach, and would grant to the employee a right to be informed without redress for violation."

See also *Kephart v. Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978).

The plaintiff instituted this action within sixty days after his notice of claim was filed. The plaintiff thus violated the provision of 29 U.S.C. § 626(d) for a 60 day waiting period after the claim is filed. This default caused no harm to the defendant as evidenced by the fact that no effort was made to stay this suit until the running of the 60 day period. To allow such a minor default to totally bar recovery where the action is long delayed partially because of the defendant's failure to post an adequate notice would

be inconsistent with the application to the case of an equitable modification. The defendant's contention respecting the statute of limitation is likewise without merit. The statute of limitations runs from the filing of the 180 day charge. See *Downey v. Southern Natural Gas Co.*, 649 F.2d 302 (5th Cir. 1981). Finally, the defendant contends the evidence of discrimination is insufficient. The short answer to this contention is that the plaintiff's testimony, if believed, is sufficient to justify the jury's finding with respect to discrimination. Based upon the foregoing, the defendant's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial will be denied.

The plaintiff has by his motion asked the court to disregard the jury's finding on the wilfulness issue and substitute its own finding of wilfulness in favor of the plaintiff. Aside from the fact that the court lacks such authority, the jury's finding was clearly justified by the evidence. The plaintiff seems to suggest that the jury charge submitted an improper standard of wilfulness to the jury. The charge given on the issue of wilfulness, however, was given without objection by the plaintiff and was substantially similar to the charge requested by the plaintiff. See plaintiff's Requested Jury Instruction No. 17.

If the plaintiff desires an award of costs, attorney's fees or equitable relief, he shall move for same within ten days from the date of this order. After that motion is disposed of, a judgment will be entered consistent with the foregoing.

APPENDIX B

Leon G. KAZANZAS, Jr., Plaintiff-Appellant,
Cross-Appellee,

v.

WALT DISNEY WORLD CO.,
a Delaware Corporation doing business in Florida,
Defendant-Appellee, Cross-Appellant.

No. 81-6238

United States Court of Appeals,
Eleventh Circuit.

May 19, 1983.

Gurney, Gurney & Handley, P.A., Ronald L. Harrop, W. Marvin Hardy, III, Orlando, Fla, for plaintiff-appellant, cross-appellee.

DeWolf, Ward & Morris, P.A.,John L. O'Donnell, Jr., Orlando, Fla, for defendant-appellee, cross-appellant.

Appeals from the United States District Court for the Middle District of Florida.

Before JOHNSON and ANDERSON, Circuit Judges, and COLEMAN, Senior Circuit Judge.

JOHNSON, Circuit Judges.

---

*Honorable James P. Coleman, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Leon G. Kazanzas filed suit against his former employer, Walt Disney World Company ["Disney"], claiming that because of his age Disney had discharged him and later failed to rehire him, in violation of the Age-Discrimination in Employment Act ["ADEA"], 29 U.S.C.A. § 621 *et seq.* At the close of the evidence the district court granted a directed verdict for Disney on the failure to rehire claim and reserved ruling on the timeliness of the action for the discharge claim. The jury returned a special verdict finding that age was a motivating factor in Kazanzas' discharge, but that Disney did not willfully discriminate. The district court later held that Kazanzas' suit was not time-barred and entered judgment accordingly. 518 F.Supp. 292 (M.D.Fla. 1981). Both parties appeal the judgment below, but, because the statute of limitations issue is dispositive of this appeal, we do not address any other issues.

To bring an action under the ADEA, a plaintiff must observe two time requirements. First, he must comply with 29 U.S.C.A. § 626(d) which requires that he file a charge alleging discrimination with the Secretary of Labor[1] within 180 days of the alleged unlawful practice and sixty days before he files suit.[2] The statute directs that after the

---

[1]Although the statute states that a charge shall be filed with the Secretary of Labor, all functions related to age discrimination were transferred to the Equal Employment Opportunity Commission by section 2 of Reorg. Plan No. 1 of 1978, 43 F.R. 19807, *reprinted in* 5 U.S.C.A. app. at 161 (West Supp. 1983), *and in* 92 Stat. 3781 (1978).

[2]If the state in which plaintiff resides has a state law prohibiting age discrimination, the plaintiff must file the charge "within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier." § 626(d)(2)

Secretary receives this charge he shall seek to eliminate the unlawful practice through conciliation, conference, and persuasion. Second, a plaintiff must comply with 29 U.S.C.A. § 626(e) which incorporates the statute of limitations from the Portal-to-Portal Act, 29 U.S.C.A. § 255. The statute of limitations under 29 U.S.C.A. § 255 is two years, or three years for willful violations.

[1] The district court extensively discussed whether the first requirement, the 180 days charge provision, is subject to equitable tolling on the facts of this case. Concluding that it is, the court disposed of the second requirement, the statute of limtations, by stating "[t]he statute of limitations runs from the filing of the 180 day charge." 518 F.Supp. at 294. The district court erred in this conclusion because the statute of limitations runs from the same date as the 180 day provision, the date on which the cause of action accrues. Therefore, even if the 180 day provision is tolled, the statute of limitations might still bar Kazanzas' suit because he filed his action more than two years[3] after his discharge.

In stating that the cause of action runs from the filing of the 180 day charge, the district court relied on *Downey v. Southern Natural Gas Co.*, 649 F.2d 302, 304 (5th Cir. 1981). *Downey* does not support the district court's conclusion. In *Downey* the Fifth Circuit affirmed a ruling that certain of Downey's claims were time-barred because he did not comply with the 180 day notice provision. In rejecting Downey's argument that he did not have to file a notice within 180 days, the Fifth Circuit stated:

[3]We apply the two year statute of limitations because, as noted above, the jury specifically found that Disney's violation was not willful. Moreover, Kazanzas has not contested this finding on appeal, or argued that the three year period should apply.

> This contention was specifically rejected by this court in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485, 487 (5th Cir. 1974). The court explained that the required 180 day notice was a "prerequisite" to filing suit, and that after the notice was given the plaintiff would have two or three years to file suit depending on the type of violation.

Id. at 304 (footnote omitted). The *Downey* court by this observation was focusing on the 180 day provision and only mentioned the two or three year period in the contest of stating that the plaintiff must comply with both time requirements. An examination of the section of *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485, 487 (5th Cir. 1974), referred to by *Downey* confirms this analysis. hat section of *Powell* affirmed that the 180 day provision is not inconsistent with the existence of a separate statute of limitations. Moreover, the court in *Powell* emphasized that the two time limits are separate and distinct:

> The 180 day limit is not upon the filing of the suit, but upon notice to the Secretary that one intends to bring suit. Thus it is entirely possible to comply with the notice requirement, yet still be in violation of the limit on filing an action by exceeding the two or three year provisions of the Portal-to-Portal Act. The notice requirement in no way supplants the statutory period of limitation engrafted from the Portal-to-Portal Act. Rather it is simply a prerequisite to the right to file any suit whatsoever under the ADEA.

Id. at 487.

Even if the dictum in *Downey* is interpreted as support for the district court's statement, it directly conflicts with other cases holding that the statute of limitations begins to run when the cause of action accrues. In *Marshall v.*

Kimberly-Clark Corporation, 625 F.2d 1300, 1301 (5th Cir. 1980), the court reversed a summary judgment that had dismissed plaintiff's claim as barred by the statute of limitations, stating that a genuine issue of material fact existed as to the date of discharge. In doing so, the court noted that the limitations period under 29 U.S.C.A. § 626(e) begins to run at the same time as the 180 day period. See *Jackson v. Alcan Sheet & Plate,* 462 F.Supp. 82, 86 (N.D.N.Y. 1978); *Aguilar v. Clayton* 452 F.Supp. 896, 899 (E.D.Okla. 1978).

The district court's conclusion also contradicts the teaching of *Unexcelled Chemical Corporation v. United States,* 345 U.S. 59, 73 S.Ct. 580, 97 L.Ed. 821 (1953), which addressed the relationship between administrative relief and the Portal-to-Portal Act's statute of limitations. In *Unexcelled* the Court held that the statute of limitations runs from the date of the allegedly unlawful act, rejecting the argument that the statute only begins to run after the case has been administratively determined by the Secretary of Labor. The Court noted that, even though the administration of the Act is entrusted in large measure to the Secretary of Labor and a court must hold its hand until the administrative proceedings are completed, the statutory liability runs from the date when the cause of action is created. *Id.* at 66, 73 S.Ct. at 584.

[2] Because the statute of limitations on Kazanzas' discharge claim commenced on the date of his discharge, February 26, 1977 and he did not file suit until July 27, 1979, after the two-year period had expired, his claim is barred unless there are equitable considerations sufficient to toll the statute. Although in some circumstances the factors mandating tolling of the 180-day provision would also toll the statute of limitations, it is important to

separately analyze the tolling of each period, as certain factors may only be applicable to one of the periods.

The district court summarized the relevant facts that should be evaluated in deciding whether equitable modification is warranted.

> The plaintiff was discharged by the defendant on 26 February 1977. At the time of his discharge, the plaintiff knew that he could not be discriminated against because of his age. The plaintiff testified that he imagined the source of this knowledge was a poster in evidence as defendant's Exhibit 4 which had been placed on defenddant's premises. As a management level employee, the plaintiff had read the collective bargaining contract which covered workers in the plaintiff's employment unit. Article 13 of the agreement in effect on 1 October 1976 provides: "The Company and the Union agree there shall be no discrimination against any employee or prospective employee due to race, color, creed, sex, age or national origin as provided in Federal and State legislation." On the day of plaintiff's discharge, Gary Lawton, a personnel manager of defendant, told the plaintiff that Lonnie Linley, had made the decision to lay off the plaintiff and to retain Bill Cunningham, another of defendant's employees. At the same time, Lawton told the plaintiff that Bill Cunningham was seven years younger than the plaintiff, but that the plaintiff would be the first person to be recalled when an opening developed. Thus, when the plaintiff was discharged he was generally aware of a right not to be discriminated against on the basis of age and of facts which would reasonably lead the plaintiff to conclude that his discharge was based on age. Despite this knowledge, the plaintiff did not consult with an attorney until June, 1979.

518 F.Supp. at 293. The district court analyzed these facts in the context of determining whether Kazanzas was entitled to equitable modification of the 180 day provision due to Disney's failure to post a notice informing its employees of their ADEA rights. Under 29 U.S.C.A. § 627, an employer is required to post a notice in the form approved by the Secretary of Labor. A copy of the notice which had been approved for use in 1977 was introduced at a post-trial hearing. It clearly states that an employee who feels he has been discriminated against because of age must file a charge with the Department of Labor within 180 days. Because of Disney's failure to post this notice, the district court held that "the filing period should be tolled until the plaintiff first consulted an attorney in June, 1979." 518 F.Supp. at 294.

[3] We conclude that the factors which led the district court to equitably modify the 180 day provision do not mandate the tolling of the statute of limitations. Modifying either period because Kazanzas did not have knowledge of the ADEA's time requirements contravenes the normal rule that "[i]gnorance of . . .legal rights or failure to seek legal advice, [does] not toll the statute." *Quina v. Owens-Corning Fiberglas Corp.*, 575 F.2d 1115, 1118 (5th Cir.1978) (quoting *Howard v. Sun Oil Company*, 404 F.2d 596, 601 (5th Cir.1968)): Moreover, the Fifth Circuit's statement eight years ago that "[i]t is too late in the day to urge the statute's 'newness'," *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 120 (5th Cir. 1975), is even more true today. Nevertheless, the district court believed that barring Kazanzas' claim for failure to comply with the 180 day provision when Disney had not posted the required notice "would place a duty upon the employer to comply without penalty for breach and would grant to the employee a right to be informed without redress for viola-

tion." 518 F.Supp. at 294 (quoting *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 1983 (3rd Cir.1977)). That rationale has little force for the two year period when the approved notice does not even mention the two year statute of limitations. Additionally, in the context of the two year period, Kazanzas' actual knowledge of his rights brings this case within the rule of *Templeton v. Western Union Telegraph*, 607 F.2d 89 (5th Cir.1979).

The district court acknowledged that the facts of this case are very close to those of *Templeton*. In *Templeton* the employee had seen a 1968 poster informing him of his ADEA rights but had not seen the 1974 poster which cotained the 180 day notice requirement. The Court held that Templeton was barred by his failure to comply with the 180 day provision because he had knowledge of his ADEA rights. The only difference between this case and *Templeton* is that Kazanzas had general knowledge of his right not to be discriminated against on the basis of age but may not have known of the existence of the ADEA. While this difference may be dispositive for a failure to comply with the 180 day provision, a relatively short time period, it is not important when assessing whether Kazanzas' claim is also barred because he did nothing to pursue his claim for more than two years.

[4, 5] Kazanzas also urges that Disney is estopped from raising the limitations period because Disney held out hopes of reemployment.[4] The basis for estopping a de-

[4]Even if Disney's action constituted conduct sufficient to give rise to estoppel, Kazanzas' claim might not survive because his contacts with Disney ended approximately one and a half years before the expiration of the statute of limitations. "[I]f there is still ample time to institute the action within the statutory period after the circumstances inducing delay have ceased to operate, a plaintiff who failed to do so cannot claim an estoppel." 51 Am.Jur.2d § 437. *Troutman v. Southern*

fendant from raising the limitations period is "the maxim that no man may take advantage of his own wrong." *Glus v. Brooklyn Eastern Terminal,* 359 U.S. 231, 232, 79 S.Ct. 760, 761, 3 L.Ed.2d 770 (1959). A review of ADEA cases discussing equitable estoppel demonstrates that Disney is not estopped from asserting the statute as a bar because in this case it committed no wrong.

In *Ott v. Midland-Ross Corp.,* 600 F.2d 24 (6th Cir.1979), Ott filed a notice of intent to sue with the Secretary of Labor shortly after his discharge. An employee of the Department of Labor attempted conciliation and, after contacting the defendant's attorneys, told Ott that, because the defendant had agreed to rehire him, it would be best to negotiate the details of reemployment directly with the company rather than through the Department of Labor. Subsequently, Ott agreed to do consulting work, upon representations from the company that it would be financially more advantageous than his former position. Ott did not work a single day under the consultation agreement. The court reversed a grant of summary judgment for the employer, holding that there was ample evidence for the jury to find that Ott was lulled into nonaction, thereby estopping his employer from raising the statutory bar:

> At the very least, the jury could find that the consultation agreement was the product of material

---

Railway Company, 296 F.Supp. 963, 970 (N.D.Ga. 1968), *aff'd,* 441 F.2d 586 (5th Cir.), *cert. denied,* 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971) (fraudulent representations, if any, had ceased more than one year prior to the termination of the limitations period). Contra *Ott v. Midland-Ross Corp.,* 600 F.2d 24, 33 (6th Cir. 1979) (plaintiff should be allowed full statutory period, "undiminished by any period of deception" to bring his suit).

> misrepresentations of fact by Midland-Ross' general counsel. At worst, it could find that defendant's conduct constitutes fraud, it having entered into the consultation agreement without intending to honor it and for the purpose of frustrating Ott's intention to seek redress under the ADEA.

Id. at 29-30. However, the court also stated that, "[i]f the agreement is not found to be the product of misrepresentation or the result of a calculated scheme to deprive him of his right of action", Ott's claim would be time-barred. *Id.* at 34.

In *Potter v. Continental Trailways, Inc.*, 408 F.Supp. 207 (D.Col.1979), the district court denied motions for dismissal or summary judgment because Potter had alleged sufficient facts to estop Continental from asserting the 180 day bar. In *Potter* the employer's agents had "encouraged him to utilize the 'back door' method towards full-time employment should full-time work not be available." *Id.* at 211. Potter, in reliance on this information, began driving part-time; it was not until the 180 days expired that he realized that he would never be eligible for full time employment through the "back-door" because the general manager would would warn his supervisor whenever he worked close to the 20 days per month necessary for full-time work. The court held that Continental would be estopped from raising the 180 day limitations period "where the alleged action of its own agent in suggesting the "back door' method induced Potter to delay filing suit until after the 180 days passed from the alleged unlawful act." *Id.*

In *Coke v. General Adjustment Bureau, Inc.*,640 F.2d 584, 595 (5th Cir.1981) (en banc), the Fifth Circuit reversed a grant of summary judgment to the defendant

because there was a genuine issue of material fact with respect to whether the defendant "misrepresented" its intent to reinstate Coke. Coke had been repeatedly assured by the company through a third person that he would be reinstated to his former position. Relying on these assurances, Coke did not file the notice until more than 180 days after his demotion but within 180 days of the last assurance by his employer that he would be reinstated.

This case lacks the crucial elements of fraud or misrepresentation present in *Ott, Potter,* and *Coke.* Kazanzas was discharged on February 26, 1977. After his discharge he tried to obtain reemployment with Disney. He was offered a job in cash control but declined it because it would have meant a substantial cut in pay. In July, 1977, Kazanzas' former supervisor informed him that there was an opening in the paint shop, but advised him that it would be necessary for him to have a physical examination. Disney ultimately refused to rehire Kazanzas because the medical report showed that he had degenerative disc disease.[5] These good faith efforts by Disney cannot serve to estop it from asserting the statute of limitations. See *Ott, supra,* 600 F.2d at 33 n. 11 ("It was entirely proper for the employer to have sought in good faith to rehire Ott, if it, in fact, intended to honor the agreement and if, in fact, the agreement was not tainted by misrepresentation"). As the district court observed "[t]his case is unlike *Coke* in

[5]The subsequent failure to rehire does not toll the statute of limitations by converting the initial discharge into a continuing violation in the absence of any allegation that defendant was contractually obligated to rehire the plaintiff. E.g., *Brohl v. Singer Company,* 407 F.Supp. 936, 939 (M.D.Fla. 1976). Furthermore, this failure to rehire formed the basis of Kazanzas' alternative claim, on which the district court directed a verdict for Disney.

that here there was no misrepresentation by the defendant of its intent to rehire or otherwise to accommodate the plaintiff's claim." 518 F.Supp. at 294. Although a plaintiff seeking an estoppel does not have to prove bad faith, *Ott, supra,* 600 F.2d at 31, in order to estop Disney from claiming the protection of the statute, its "conduct or representations [must be] directed to the very point of obtaining the delay of which [it] seeks to take advantage." 51 Am.Jur.2d § 438 at 904. There was no allegation that Disney's actions were motivated by a desire to lull. Kazanzas into inaction. In addition, Disney's conduct cannot be characterized as misleading. See *Sanchez v. Loffland Brothers Co.,* 626 F.2d 1228 (5th Cir.1980), *cert. denied,* 452 U.S. 962, 101 S.Ct. 3112, 69 L.Ed.2d 974 (1981).[6] Instead of being deceived about the possibility of reemployment Kazanzas was actually offered one job which he refused and another which a physical disability prevented him from accepting. Disney never told Kazanzas that it would reinstate him in his old job, and did nothing to keep him from filing a law suit or seeking the advice of an attorney.

Because Kazanzas filed his suit more than two years after his discharge, and because he has not alleged any facts which estop Disney from raising the defense of the statute of limitations, his suit is barred. The judgment of the district court is REVERSED.

---

[6]"The estoppel principle has been successfully invoked where the defendant made active misrepresentations to the plaintiff regarding the plaintiff's legal rights, as well as in cases where the defendant promised to pay the claim or to settle if the plaintiff did not file suit. However, in order to create an estoppel, the conduct of the defendant must be so misleading as to cause the plaintiff's failure to file suit." 626 F.2d at 1231 (footnotes omitted).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-6238

LEON G. KAZANZAS, JR.,
Plaintiff-Appellant,
Cross-Appellee,

versus

WALT DISNEY WORLD CO.,
a Delaware Corporation doing
business in Florida,
Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING

Before JOHNSON and ANDERSON, Circuit Judges, and COLEMAN,* Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

---

*Honorable James P. Coleman, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/ * * * Johnson
United States Circuit Judge

Persons 40-65 Years Note!

The Federal Age Discrimination in Employment Act prohibits arbitrary age discrimination in employment by:

- Private Employers of 20 or more persons
- Federal, State, and Local Governments, without regard to the number of employees in the employing unit
- Employment Agencies serving such employers
- Labor Organizations with 25 or more members

Certain exceptions are provided.

If you feel you have been discriminated against because of age, contact the nearest office of the Wage and Hour Division, U. S. Department of Labor. It is important to contact the Division promptly.

If you wish to bring a court action yourself, you must first notify the Secretary of Labor of your intent to do so. This notice should be filed promptly, but in no event later than *180* days after the alleged unlawful practice occurred.

Questions on State age discrimination laws should be directed to State authorities. These laws may affect the *180* day time limit noted above.

Questions on Federal employment should be directed to the U. S. Civil Service Commission, Washington, D. C. 20415.

U. S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Persons 40-70* Years Note!

The Federal Age Discrimination in Employment Act prohibits arbitrary age discrimination in employment by:

- Private Employers of 20 or more persons
- Federal, State, and Local Governments, without regard to the number of employees in the employing unit
- Employment Agencies serving such employers
- Labor Organizations with 25 or more members

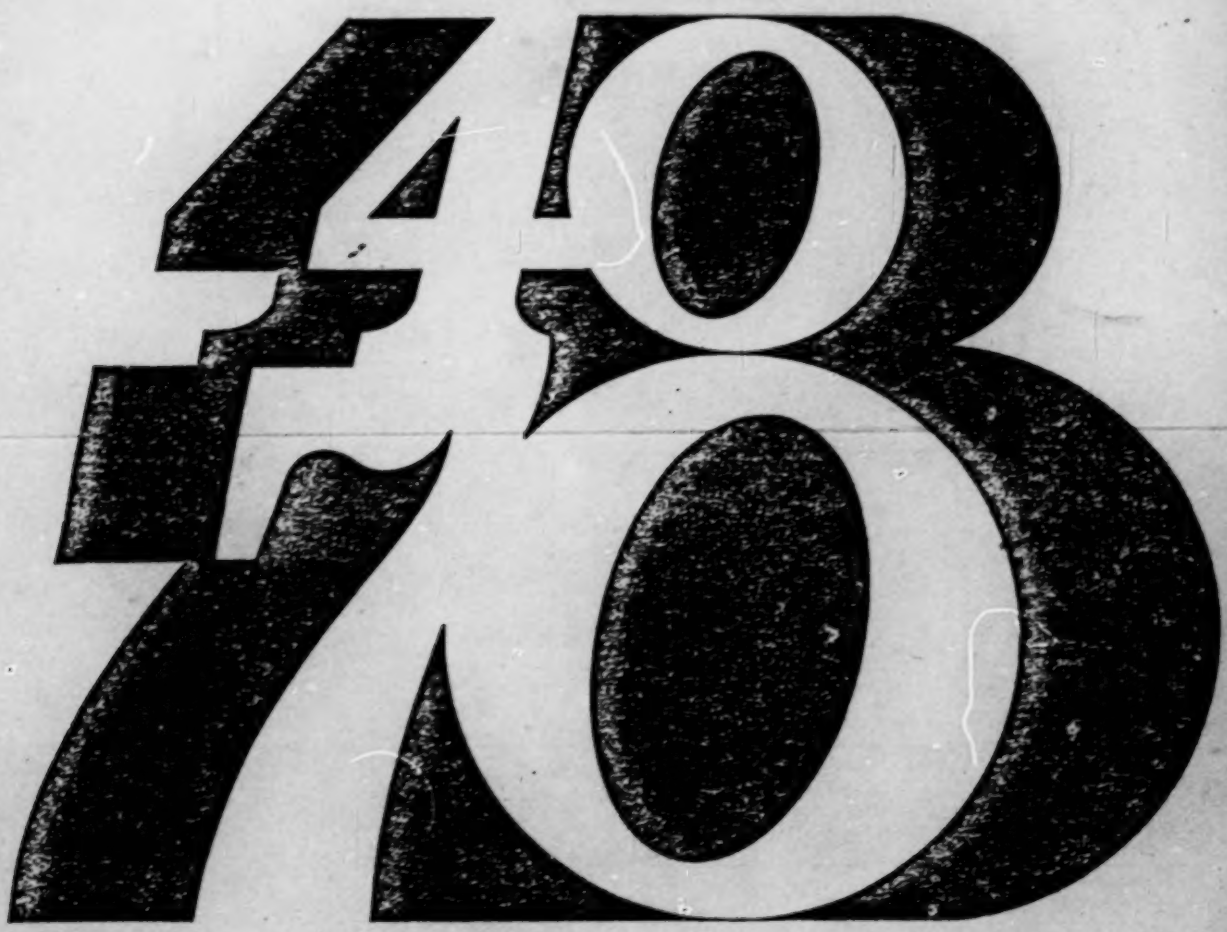
Certain exceptions are provided.

If you feel you have been discriminated against because of age, contact the nearest office of the Wage and Hour Division, U.S. Department of Labor. It is important to contact the Division promptly.

If you wish to bring a court action yourself, you must first file a written charge alleging unlawful discrimination with the Department of Labor. This charge should be filed promptly, but in no event later than *180* days after the alleged unlawful practice occurred.

Questions on State age discrimination laws should be directed to State authorities. These laws may affect the *180* day time limit noted above.

Questions on Federal employment should be directed to the U.S. Civil Service Commission, Washington, D.C. 20415.



* The upper age limit of 70 is effective January 1, 1979. Before that date the law provides protection for individuals who are between the ages of 40 and 65. The upper age limit for Federal employment is removed altogether effective September 30, 1978.

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division